NOV 1 2001

No. 01-491

In The

Supreme Court of the United States

TINA ARMSTRONG,

Petitioner,

v.

La QUINTA INNS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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PARTIES TO THE PROCEEDING
RESPONDENT

Petitioner's identification of Respondent's corporate structure is erroneous.

Respondent La Quinta Inns, Inc. is a Delaware corporation that is a wholly owned subsidiary of The La Quinta Leasing Company, a Delaware corporation. The La Quinta Leasing Company is a wholly owned subsidiary of La Quinta Corporation, a Delaware corporation. La Quinta Corporation, together with La Quinta Properties, Inc., comprise a paired-share real estate investment trust (REIT) which is publicly traded on the New York Stock Exchange under the symbol "LQI".

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent respectfully submits this Corporate Disclosure Statement:

Respondent La Quinta Inns, Inc. is a Delaware corporation that is a wholly owned subsidiary of The La Quinta Leasing Company, a Delaware corporation. The La Quinta Leasing Company is a wholly owned subsidiary of La Quinta Corporation, a Delaware corporation. La Quinta Corporation, together with La Quinta Properties, Inc., comprise a paired-share real estate investment trust (REIT) which is publicly traded on the New York Stock Exchange under the symbol "LQI".

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The Respondent, La Quinta Inns, Inc., respectfully requests that this Court deny the petition for writ of certiorari, seeking review of portions of the Tenth Circuit's Order and Judgment in this case.

COUNTER-STATEMENT OF THE CASE

In this diversity case, Petitioner alleged that La Quinta was negligent in failing to provide adequate security and that La Quinta's negligence proximately caused her alleged assault. The district court's grant of judgment as a matter of law to La Quinta pursuant to FED.R.CIV.P. 50(a), was affirmed by the Tenth Circuit Court of Appeals. Petitioner's motion for rehearing in the Tenth Circuit was denied.

The evidence at trial was that the alleged assailant entered Ms. Armstrong's room through a door left open by Ms. Armstrong. Contrary to Armstrong's statement, there was no need for the alleged assailant to "force" his way into her room. There was no evidence presented at trial that there was anything about the alleged assailant that would cause the personnel employed by La Quinta at its Amarillo facility to stop or apprehend him. While La Quinta is a place of public accommodation, there were significant limitations on access to the Amarillo La Quinta property, including a six-foot fence around the exterior of the property.

At the close of Petitioner's case, with one hour advance notice to La Quinta's counsel, Petitioner sought

to introduce into evidence fourteen (14) uniform incident reports by attaching them to an affidavit from a non-testifying witness employee of the Amarillo Police Department. The documents sought to be introduced were reports allegedly maintained by the Amarillo Police Department containing statements received from alleged crime victims, witnesses, and suspects. In many instances, it was not possible to determine, from the offered reports, whether any crimes had actually occurred. No evidence of the geographic proximity of the alleged incidents reported to the Amarillo La Quinta premises was introduced. Nor was there any evidence that La Quinta knew or should have known about the alleged incidents reported.

Ms. Armstrong did not offer the uniform incident reports into evidence under FED.R.EVID. 803(8). Neither the trial court nor the Tenth Circuit ruled on the admissibility of the proffered evidence under FED.R.EVID. 803(8).

The Tenth Circuit, after conducting a de novo review, affirmed the district court's judgment as a matter of law for the reasons stated by the trial judge in his memorandum opinion. *Petitioner's Appendix at 3(a).* The district court refused to admit uniform incident reports as business records without a testifying witness pursuant to FED.R.EVID. 803(6). The district court also refused to admit the reports because Plaintiff had made no showing that the alleged crimes recorded therein actually occurred, were similar to the alleged assault against Plaintiff, were geographically proximate, or that La Quinta knew or should have known of the alleged crimes contained in the reports.

REASONS FOR DENYING THE WRIT

I. PETITIONER'S INCLUSION OF FED.R.EVID. 803(8) IN QUESTION NO. 1 AS A BASIS FOR ADMISSION OF THE UNIFORM INCIDENT REPORTS IS IMPROPER AS IT WAS NOT RAISED OR ARGUED TO THE DISTRICT COURT OR RULED UPON BY THE TENTH CIRCUIT.

The Court will not grant certiorari on questions not pressed or passed upon below. *United States v. Williams*, 504 U.S. 36 (1992). At no point during the extensive argument made to the district court on the issue of the admissibility of the uniform incident reports did Petitioner's counsel ever raise or argue FED.R.EVID. 803(8), the public records exception to the hearsay rule. It is clear that the district court did not rule on the exhibit's admissibility under FED.R.EVID. 803(8) in its Opinion. *See Petitioner's Appendix at p. 10(a).* Nor did the Tenth Circuit address the exhibit's admissibility under FED.R.EVID. 803(8). *See Petitioner's Appendix at 3(a).* The Tenth Circuit merely adopted the reasoning of the district court which based its rejection of the exhibit on its inadmissibility under FED.R.EVID. 803(6), and its lack of probative value on the factors necessary to establish La Quinta's liability under Texas law. *See Petitioner's Appendix at 11(a).*

II. PETITIONER MISSTATES THE NATURE OF THE EVIDENCE EXCLUDED IN QUESTION NO. 2.

In Question No. 2, Petitioner misstates the nature of the deposition testimony which the district court excluded. Petitioner refers to the excluded deposition testimony as "testimony regarding a standard of care

voluntarily assumed by" La Quinta, *Petition for Certiorari ("Petition") at i*, and evidence of "La Quinta's own voluntarily established duty of care." *Petition at 13.* This is not a correct description of Mr. Devine's testimony. It is apparent from the excerpt of Mr. Devine's deposition testimony quoted in the Petition that Petitioner was soliciting an opinion on the legal question of whether La Quinta had a duty to exercise reasonable care to protect invitees from the intentional torts of third parties. *See Petition at 13* (quoting Mr. Devine's testimony). It is also apparent from the deposition, itself, that the question is not merely "referring to policies of La Quinta." *Petition at 13.* In any case, a jury would have no way of determining the context of the deposition by the isolated portion sought to be presented.[1] Nor would Petitioner's failure to produce any evidence as to the standard of care in the hotel industry generally[2] have been remedied by the introduction of Mr. Devine's testimony as to La Quinta's "duty."

Petitioner misstates the nature of the excluded evidence when she describes Mr. Devine's testimony as

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[1] Because the Devine deposition excerpt at issue was offered at trial, in isolation from any deposition testimony regarding security policies or other topics that preceded the proffered deposition testimony, the testimony has no context other than a request for a legal opinion.

[2] Discussing Plaintiff's failure to present testimony on the standard of care at oral argument on La Quinta's Motion for Judgment as a Matter of Law, the trial court stated: "We have nothing to compare it to. All we have is a crime which is extremely unfortunate. But we don't have any other motels. We don't know what the Days Inn or the Comfort Inn or anyone else in the country in similar circumstances does . . . ".

relating only to La Quinta's own policies or directed at establishing a "standard of care."

III. PETITIONER HAS FAILED TO DEMONSTRATE ANY BASIS FOR THIS COURT'S ASSUMPTION OF CERTIORARI JURISDICTION.

Plaintiff advances no argument on why this Court should grant certiorari in this case. Presumably, Petitioner requests this Court to exercise its certiorari jurisdiction to find the district court abused its discretion when it failed to admit the two pieces of evidence at issue and to then determine if any such abuse of discretion affected the ultimate result in the case – judgment as a matter of law. Abuse of discretion is the standard exercised by the federal appellate courts when engaging in the review of evidentiary issues pursuant to their appellate jurisdiction under 28 U.S.C. § 1291 (1948). *See City of Hobbs v. Hartford Fire Insurance Co.*, 162 F.3d 576, 582 (10th Cir. 1998). However, this Court's certiorari jurisdiction is not an appellate jurisdiction. *See* 28 U.S.C. § 1254 (1948). Nor is it concerned with the factual and evidentiary issues arising in a particular case. *Texas v. Mead*, 465 U.S. 1041, 1043 (1984) *(citing United States v. Johnson*, 268 U.S. 220, 227 (1925)).

Instead, guided by the prudential considerations contained in Sup. Ct. R. 10, Petitioner is required to demonstrate the existence of an "important" matter and a recognized basis for this Court's certiorari jurisdiction. The concept of importance relates to importance to the public as distinguished from the importance of the issues to the parties involved. *Rice v. Sioux City Cemetery*, 349

U.S. 70, 74 (1955). The only bases for this Court's exercise of its certiorari jurisdiction even mentioned in passing by Petitioner are not present in this case.

A. Petitioner Has Failed To Demonstrate Any Conflict With Relevant Decisions of this Court Or Any Conflict With a Decision of Another United States Court of Appeals as to the Admissibility of the Uniform Incident Reports.

Petitioner states that "the district and appellate courts ignored established Supreme Court precedent" in refusing to admit the incident reports. *Petition at 9.* The basis for certiorari contained in SUP. CT. R. 10 indicates that certiorari "will be granted only when there are special and important reasons therefor." One reason stated in Rule 10 is:

> C. When a state court or United States Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Even assuming that the outcome of a dispute over an item of evidence in a particular case is an "important" "federal question," Petitioner has failed to demonstrate any conflict between this Court's decisions on the business records exception to the hearsay rule and the Tenth Circuit's decision. The only Supreme Court case cited by Petitioner for the proposition that Supreme Court precedent has been "ignored" is *Bracey v. Gramley,* 520 U.S. 899 (1997). *Bracey v. Gramley* does not discuss the Federal Rules of Evidence, FED.R.EVID. 803(6), or hearsay. *Bracey* is

a case involving a habeas petitioner's request for discovery on his judicial bias claim. Petitioner has failed to show any relationship, no less a "conflict," between the Tenth Circuit's decision and any applicable decision of this Court.

Petitioner next intimates that there is a "conflict" between the Tenth Circuit's decision and the decisions of other United States Courts of Appeal on the admissibility of the uniform incident reports. *See Petition at 10-12* ("Both the district court and the Tenth Circuit Court of Appeals failed to follow precedent established within the Tenth Circuit and other circuits related to the admissibility of police reports without a testifying witness."). The Tenth Circuit's failure to follow its own precedent is not a basis for this Court's jurisdiction even if it were true, which it is not. *See United States v. Snyder*, 787 F.2d 1429, 1433-34 (10th Cir.), *cert. denied*, 479 U.S. 836 (1986). Decisions by other courts of appeal are not "precedent" to be followed by the Tenth Circuit. *See Estate of Morris v. Commissioner of Internal Revenue*, 243 F.3d 1254, 1259 (10th Cir. 2001).

Rule 10 provides for the exercise of certiorari jurisdiction where a circuit court has entered a decision in conflict with another circuit court "on the same important matter . . . " Petitioner has failed to show any conflict between the Tenth Circuit's affirmance of the district court's decision under FED.R.EVID. 803(6) and any other circuits' determinations on this same question. In fact, the majority of cases cited by Petitioner for her assertion that "federal courts have repeatedly admitted police reports into evidence," *Petition at 10*, are cases arising under the public records exception to the hearsay rule, FED.R.EVID.

803(8), a basis that was not argued or demonstrated below or ruled upon by the lower courts. In addition to being irrelevant to the FED.R.EVID. 803(6) issue actually before the district court and the Tenth Circuit, these cases do not support the admissibility of documents similar to the incident reports under the public records exception to the hearsay rule. *See, e.g., Beech Aircraft Corp. v. Rainey,* 488 U.S. 153, 160 (1988) (opinion contained in comprehensive Judge Advocate General report admissible under FED.R.EVID. 803(8)(C)); *Thompson v. Office and Professional Employees Int'l Union,* 74 F.3d 1492, 1506 (6th Cir. 1996) (letter from public official not admissible under FED.R.EVID. 803(8)(C) as a public record); *In re Air Disaster at Lockerbie Scotland,* 37 F.3d 804, 827 (2nd Cir. 1994) (report by detective based on law enforcement investigations conducted by other police officers admissible as a public record). *Gilbert v. Gulf Oil Corp.,* 175 F.2d 705, 710 (4th Cir. 1949) (letter inadmissible as business record and "public document") does not support Petitioner's contention and predates the enactment of the Federal Rules of Evidence in 1972 as pointed out to Petitioner's counsel by the trial court judge at oral argument on this matter. ("That's obviously well before the Rules of Evidence. 1949."). These cases do not support Petitioner's contention that a conflict exists among the federal courts of appeal on the admissibility of similar documents. Nor do these cases support the admissibility of the uniform incident reports under the business records exception or the public records exception to the hearsay rule.

Beech Aircraft concerned a "longstanding conflict" among the federal appeals courts regarding the admissibility of the conclusions and opinions contained in

public records pursuant to FED.R.EVID. 803(8). Petitioner sought to introduce the incident reports for the "facts" contained therein. Ms. Armstrong cites only three cases that involve the business records exception, and none of them support her assertion that a conflict among the circuits exists. Nor do they support a result on admissibility different than that determined by the district court and the Tenth Circuit. In *Wilson v. Zapata Off-Shore Company*, 939 F.2d 260, 271 (5th Cir. 1991), the court held that a hospital record may be admitted under FED.R.EVID. 803(6) if every participant in the "chain producing the record" is acting in the regular course of business. In this case, the individuals who reported alleged crimes to the police officers writing the reports were not acting in the regular course of business – they were not under a duty to report honestly or accurately. *See Petitioner's Appendix at 10(a)* ("They consisted of the statements of witnesses to alleged crimes as recorded by police officers").

In re Japanese Electronics Products Antitrust Litigation, 723 F.2d 238 (3rd Cir. 1983), the court stated that the testimony of a records custodian was not required "in the occasional case where the requirements for qualification as a business record can be met" by other evidence. *Id. at 288* (emphasis added). In that case, subsequently overruled on other grounds, *see Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), the defendants did not challenge the trial court's interpretation of Rule 803(6), that the records could be admitted without the testimony of the records custodian. On appeal, the Third Circuit held that some of the proffered business records could be offered as "a record of what transpired at a particular meeting" by a person with

demonstrated personal knowledge thereof and not for the truth of the double and triple hearsay contained therein. *Id. at 290.* Nor was there any showing of untrustworthiness with regard to the records sought to be admitted. *Id. at 291.* In this case, the untrustworthiness of the business records on the only issue on which they could have been probative, the occurrence of criminal activity, was manifest and would have required accepting double and triple hearsay on the issue of what criminal activity occurred.

Rosario v. Amalgamated Ladies Garment Cutters' Union, 605 F.2d 1228 (2nd Cir. 1979), held that a police report was admissible under Rule 803(6) where the reporting officer testified and where the record was not based on the observations of a bystander or third party. In the case before this Court, the reporting officers did not testify and the proffered reports contained statements regarding alleged crimes reported by third parties whose reliability was questioned by the reporting officers themselves. *See Petitioner's Appendix at 10(a).*

Petitioner's assertion that the Tenth Circuit "failed to follow 'well-established authority' regarding the admissibility of police reports," *Petition at 12,* is not a ground for this Court's assumption of certiorari jurisdiction under SUP. CT. R. 10 and is as equally without basis as Petitioner's assertions that there is a conflict between the circuits or with prior Supreme Court decisions. Petitioner's "well-established authority," *United States v. Versaint,* 849 F.2d 827 (3rd Cir. 1988), concerned the admissibility of a police report under FED.R.EVID. 803(8) where its author testified at trial as to the report's reliability. Petitioner has failed to establish any basis for this Court's exercise of certiorari jurisdiction with regard

to the proffered uniform incident reports. And Petitioner has failed to demonstrate any error by the Tenth Circuit regarding the admissibility of the reports.

B. The Tenth Circuit's Opinion Affirming the Exclusion of Deposition Testimony Regarding the Legal Issue of Whether La Quinta Had a Duty to Petitioner Is Consistent with Other Circuit Courts.

Petitioner has failed to provide any basis for this Court's assumption of certiorari jurisdiction on the issue of the admissibility of Mr. Devine's testimony. Petitioner asserts, without authority, that the Tenth Circuit "ignored well-established precedent within the Tenth Circuit and other circuit courts by disallowing this testimony." *Petition at 15.* Because there is no conflict between the Tenth Circuit's opinion in this case and other circuit courts, the Court should not assume certiorari jurisdiction.

The district court excluded the Devine deposition excerpt on the grounds that it contained a legal conclusion, and the Tenth Circuit's opinion affirming that evidentiary ruling does not conflict with decisions from any other courts of appeals. *Specht v. Jensen,* 853 F.2d 805, 809-810 (10th Cir. 1988), *cert. denied,* 488 U.S. 1008 (1989), sets forth the applicable rule that a witness may not "define the legal parameters within which the jury must exercise its fact-finding function." In this instance, the deposition testimony was properly excluded because it constituted an opinion that La Quinta owed a duty to protect invitees from the intentional torts of third parties. The Tenth Circuit's opinion affirming the district court's

ruling was consistent with *Specht* and with decisions from every court of appeals that has addressed this question. *See Burkhart v. Washington Metropolitan Area Transp. Auth.*, 112 F.3d 1207, 1212 (D.C. Cir. 1997); *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 99 (1st Cir. 1997); *Andrews v. Metro North Commuter RR.*, 882 F.2d 705, 709 (2d Cir. 1989); *Adalman v. Baker, Watts & Co.*, 807 F.2d 359, 368 (4th Cir. 1986); *Snap-Drape, Inc. v. Commissioner of Internal Revenue*, 98 F.3d 194, 198 (5th Cir. 1996), *cert. denied*, 522 U.S. 821 (1997); *Torres v. County of Oakland*, 758 F.2d 147, 150 (6th Cir. 1985); *Hogan v. AT&T*, 812 F.2d 409, 411 (8th Cir. 1987); *Aguilar v. International Longshoremen's Union Local #10*, 966 F.2d 443, 447 (9th Cir. 1992); *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1246 (10th Cir. 2000); *Montgomery v. Aetna Cas. & Surety Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990).

The cases cited by Petitioner in her Petition for Certiorari do not demonstrate a conflict among the circuits on this issue. The cited decisions do not concern a witness "direct[ing] the jury's understanding of the legal standards upon which their verdict must be based." *Specht v. Jensen*, 853 F.2d 805, 809 (10th Cir. 1988), *cert. denied*, 488 U.S. 1008 (1988). Rather, they concern the admissibility of lay opinion testimony under FED.R.EVID. 701. The Devine deposition testimony is inadmissible under FED.R.EVID. 701 and under Petitioner's authority because the opinion sought is neither "rationally based on the perception of the witness" nor "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." *See* FED.R.EVID. 701. It is an opinion on an ultimate legal issue to be determined by the Court.

For example, in *Weese v. Schukman*, 98 F.3d 542, 550 (10th Cir. 1996), the Tenth Circuit held that the district court had properly permitted the defendant physician to testify as a lay witness, pursuant to FED.R.EVID. 701, because his opinions "were clearly helpful to an understanding of his decision making process in this situation." Such a situation is distinct from this case, where the proffered deposition testimony is not "based on the perception of the witness," FED.R.EVID. 701, and would have defined the law of the case by instructing the jury that La Quinta owed a duty to protect invitees from the intentional torts of third parties.

Petitioner also relies on *Getter v. Wal-Mart Stores, Inc.*, 66 F.3d 1119, 1124 (10th Cir. 1995), *cert. denied*, 516 U.S. 1146 (1995), in which lay witnesses were permitted to testify that the defendant's premises were safe at the time of the plaintiff's fall. Such factual testimony is distinct from the proffered deposition testimony by Mr. Devine on a matter which was solely within the district court's province – determining the existence of a legal duty.

Similarly, the remaining cases cited by Petitioner, *see Petition at 16-17*, are distinguishable from Mr. Devine's deposition testimony, because those cases also involve lay opinion testimony based on the witnesses' observations or personal knowledge. *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 912 (2d Cir. 1997) (based on his personal involvement in the company's personnel ranking procedures witness had a "solid foundation" to testify that age had influenced the defendant's decision to terminate plaintiff); *Samples v. City of Atlanta*, 846 F.2d 1328, 1334 (11th Cir. 1988) (former police officer's testimony that

police department had a policy of not conducting thorough investigations was rationally based on his personal observations from working on the department for nineteen years); *Slayton v. Ohio Dep't of Youth Services*, 206 F.3d 669, 676 (6th Cir. 2000) (witness offered her opinion that certain conduct violated a governmental agency's internal sexual harassment policy, but did not refer to defendants' liability under Title VII); *Burlington Northern RR Co. v. State of Nebraska*, 802 F.2d 994 (8th Cir. 1986) (lay opinion testimony regarding train safety was admissible because it was based on personal knowledge, years of experience in rail industry and review of accident reports prepared in the ordinary course of business); *Wactor v. Spartan Transp. Corp.*, 27 F.3d 347 (8th Cir. 1994) (lay opinion testimony by lockmen was admissible under Rule 701 based upon their extensive personal experience and their observations of the event in question). There is no conflict between these cases, in which lay opinions on factual issues were admitted under FED.R.EVID. 701, and the exclusion of the opinion testimony by Mr. Devine that would have invaded the district court's "province . . . to determine the applicable law and to instruct the jury as to that law." *Torres v. County of Oakland*, 758 F.2d 147, 150 (6th Cir. 1985). Petitioner has demonstrated no basis for this Court's exercise of its certiorari jurisdiction and no error by the Tenth Circuit.

IV. THE COURTS' DETERMINATION THAT THE UNIFORM INCIDENT REPORTS SHOULD BE EXCLUDED PURSUANT TO FED.R.EVID. 803(6) WAS IRRELEVANT TO THE TENTH CIRCUIT'S AFFIRMANCE OF THE TRIAL COURT'S GRANT OF JUDGMENT AS A MATTER OF LAW.

The Tenth Circuit affirmed the district court's grant of La Quinta's motion for judgment as a matter of law pursuant to FED.R.CIV.P. 50(a) "for substantially the same reasons set forth in the district court's memorandum opinion . . . " *Petitioner's Appendix at 3(a).* The district court granted the Rule 50(a) motion because "Plaintiff failed to put on sufficient evidence to demonstrate that La Quinta knew or should have known of the risk that Plaintiff would likely be the victim of violent criminal activity on La Quinta's property." *Petitioner's Appendix at 9(a).* The district court noted that applicable Texas law required Petitioner to introduce "strong" evidence that the risk of criminal conduct on La Quinta's property had reached a level indicating that sexual assault was "likely." *Id. at 11(a).* The district court reviewed the factors, recognized by the Texas courts, on which Petitioner was required to make a showing to make a prima facie case against La Quinta. They included:

(1) Whether any criminal conduct previously occurred on or near the property;

(2) How recently it occurred;

(3) How often it occurred;

(4) How similar the conduct was to the alleged incident; and

> (5) What publicity was given the criminal conduct to indicate that the landowner knew or should have known about it.

See Petitioner's Appendix at 8(a)-9(a).

Quite apart from the district court's refusal to admit Petitioner's hearsay reports, the judgment as a matter of law was granted because:

> At the close of Plaintiff's case, there was no evidence from which a reasonable juror could conclude that sexual assault was likely. The only evidence of an even arguably similar crime was the incident in the adjoining Waffle House parking lot 26 months earlier. However, *Plaintiff had no one who could describe the Timberwalk*[3] *criteria as to this incident or any of the other crime reports* in the neighborhood to the Court or jury.

Petitioner's Appendix at 11(a) [emphasis added]. The district court's opinion, adopted by the Tenth Circuit, makes clear that the judgment as a matter of law was based on Petitioner's inability to demonstrate the criteria essential to a prima facie case of premises liability in Texas. The district court's exclusion of the incident reports was based on Petitioner's failure to demonstrate the evidence's relevancy on the *Timberwalk* factors as well as on their hearsay nature. The reports' only possible probative value, proof that the crimes had occurred,[4] was insufficient to allow their admission where there was no showing as to the geographic proximity to the Amarillo La

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[3] *Timberwalk Apartments, Inc. v. Cain*, 972 S.W.2d 749, 758 (Tex. 1998).

[4] The district court correctly noted that the uniform incident reports were not even reliable indications that any crime had actually occurred. *See Petitioner's Appendix at 10(a).* ("While it is difficult to determine from their face, in some

Quinta of the crimes alleged or whether La Quinta knew or should have known about the reported incidents through any "publicity" afforded a particular crime. Had the reports been admitted, Petitioner would have been no closer to establishing a prima facie case on liability.

Thus, even if Petitioner could have cleared the hearsay hurdle, she could not escape judgment as a matter of law because of her inability to prove the *Timberwalk* factors and thereby establish that La Quinta had a duty to protect Petitioner from the intentional torts of third parties.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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instances, the officers apparently thought such statements suspect and engaged in no further investigation.").